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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-891

EDGAR PAUL, Chief of Police, Louisville Division of Police, and RUSSELL MCDANIEL, Chief of Police, Jefferson County Division of Police,

Petitioners,

—v.—

EDWARD CHARLES DAVIS, III,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-891

EDGAR PAUL, Chief of Police,
Louisville Division of Police, and
RUSSELL McDANIEL, Chief of Police,
Jefferson County Division of Police,

Petitioners,

-v-

EDWARD CHARLES DAVIS, III,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Did petitioners' dissemination of a flyer to approximately 800 private merchants and business establishments, characterizing respondent as an "Active Shoplifter," based solely on his arrest for shoplifting followed by the dismissal of all charges

against him, constitute a denial of respondent's presumption of innocence, his right to due process of law and invasion of his right to privacy, cognizable under 42 U.S.C. Section 1983?

STATEMENT OF THE CASE

On or about December 5, 1972, the petitioners, Chiefs of Police in the City of Louisville and Jefferson County, Kentucky, authorized the preparation and dissemination to the Louisville merchant community of a flyer containing names and photographs of persons described as "subjects known to be active in the criminal field of shoplifting" [App. 8].[1] According to Chief Paul, one thousand copies of the flyer were prepared, and approximately eight hundred were distributed to merchants and businessmen in downtown Louisville [App. 19]. The flyer stated that the persons whose names and photographs were contained therein "have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas" [App. 8]. The name and photograph of Edward Charles Davis III,

1/ "App." refers to the separate Appendix filed in this case.

the respondent, was contained on page 2 of the flyer under the heading, "Active Shoplifter" [App. 12].

Davis, a photographer employed by the Louisville Courier-Journal and Times, had been arrested in Louisville on June 14, 1971 for shoplifting. The charges against him were never prosecuted and were dismissed following his arrest. Davis has never been tried for nor convicted of the crime of shoplifting. On September 21, 1971, his case was "filed away with leave," and was dismissed on December 11, 1972 [App. 8].

Shortly after the flyer was released, two of Davis' fellow employees became aware of its existence and brought it to the attention of Albert C. Allen, Davis' supervisor at the Louisville Courier-Journal and Times. Mr. Allen immediately informed Davis that "he had best not find himself in a similar situation" in the future and that he "would view very seriously any further incidents of this nature" [App. 32]. Allen also testified that the circulation of the flyer "hindered" Davis' employment because, "in view of this flyer's circulation to merchants of the community, I could not, for example, assign Mr. Davis to photographing anything in a merchantile (sic) establishment and so that, should such an assignment come up, I would have been forced to have someone else cover that

assignment rather than Mr. Davis" [App. 35].[2]

Alleging that he and other persons similarly situated have suffered mental anguish, injury to reputation and impairment of earning capacity as a result of the wide and reckless distribution of the flyers by the petitioner police chiefs, Davis initiated this suit as a class action[3] under 42 U.S.C. Section 1983 and 28 U.S.C. Sections 1343(3) and (4), on December 12, 1972, seeking compensatory and punitive damages against petitioners, based on their deprivation of his right to due process of law guaranteed by the Fourteenth Amendment, and their invasion of his right to privacy, provided by the First, Fourth, Fifth, Ninth and Four-

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2/ It is significant that petitioners claim, despite the effect of their flyer, that they do not make arrest records "available to private employers" [App. 21]. Indeed, since they exchange arrest records with the Federal Bureau of Investigation [Id.], they are expressly prohibited from doing so. See Menard v. Mitchell, 328 F.Supp. 718, 727 (D.D.C. 1971).

3/ A class determination has not yet been made by the District Court.

teenth Amendments. On January 8, 1973, the District Court conducted a hearing on Davis' motion for a preliminary injunction, and thereafter denied the motion. On November 16, 1973 the District Court held that petitioners had not violated Davis' constitutional rights and dismissed his suit. On October 22, 1974, the United States Court of Appeals for the Sixth Circuit reversed the District Court's decision and remanded the case for further proceedings. The Court of Appeals, relying principally on the decision of this Court in Wisconsin v. Constantineau, 400 U.S. 433 (1971), held that Davis' claim that petitioners' action had deprived him of the right of due process guaranteed by the Fourteenth Amendment stated a cause of action.

SUMMARY OF ARGUMENT

Petitioners, by widely circulating over eight hundred copies of a leaflet branding respondent an "active shoplifter," although he had never been convicted of any crime and all charges pending against him were dropped shortly thereafter, violated his "rights, privileges or immunities secured by the Constitution" of the United States, thus permitting respondent to invoke Federal jurisdiction in accordance with 42 U.S.C. 1983.

1. Punishment without guilt, and punishment on the basis of status rather

than conduct, have both been recognized by this Court as fundamental violations of the right of due process of law guaranteed by the Fourteenth Amendment. By publicly labelling respondent a criminal, solely on the basis of his status as an arrestee, and without meeting their burden of proving him guilty beyond a reasonable doubt, petitioners ignored the constitutionally-mandated presumption of innocence and denied respondent due process of law.

2. Where the state attaches a badge of infamy to a citizen, procedural due process requires notice and an opportunity to be heard before the damage to reputation is permitted. Petitioners' publication and widespread dissemination of the flyer stigmatizing respondent as an "active shoplifter" curtailed his usefulness to his employer, jeopardized his job and damaged his good name. As the Court of Appeals recognized in holding that respondent's claim does allege a violation of constitutionally-protected rights, petitioners' failure to provide Davis with notice and an opportunity for a hearing denied him the procedural due process required by the Fourteenth Amendment.

3. This Court has construed the constitutional right of privacy to protect personal liberty from infringement by state action in a wide variety of circumstances. Respondent's arrest record is of doubtful relevance in determining his honesty or morality, but the damaging effect

of its wide dissemination on his employment, reputation, and psychological well-being constitutes a grave invasion of his right of privacy and cannot be justified by any compelling state interest.

ARGUMENT

I

PETITIONERS HAVE PUNISHED DAVIS FOR HIS STATUS AS AN ARRESTEE AND HAVE THEREBY VIOLATED HIS PRESUMPTION OF INNOCENCE AND HIS RIGHT TO DUE PROCESS OF LAW.

By publicly and intentionally circulating over eight hundred copies of a flyer branding Davis an "Active Shoplifter," the petitioners have effectively punished him for the offense of shoplifting, although he has never been convicted of that crime and all charges against him were dismissed less than a week after the flyer was issued. That respondent has in fact been punished is demonstrated by the testimony of his employment supervisor that his usefulness as a newspaper photographer has been curtailed and any future "incidents" will result in his dismissal [App. 32].

When state officials punish an innocent citizen, their action "violates the most rudimentary concept of due process of law." Giaccio v. Pennsylvania 383 U.S. 399, 405 (1966) (Stewart, J. concurring).

At the time the flyer was released, the only evidence of any wrongdoing on Davis' part was the bare fact of his arrest. But an arrest "proves nothing so far as the actual conduct of the person arrested is concerned." Menard v. Mitchell, 328 F.Supp. 718, 724 (D.D.C. 1971), rev'd in part, aff'd in part, 498 F.2d 1017 (D.C. Cir. 1974). This Court has repeatedly affirmed the basic principle that under our system of criminal justice only a conviction carries legal significance as to a person's involvement in culpable behavior. "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct." Schware v. Board of Bar Examiners, 353 U.S. 232, 241 (1957). When, as in the case at bar, the arrested person is released without trial, "whatever probative force the arrest might have had is formally dissipated." 353 U.S. at 241.

Since an arrest alone can provide no basis for the conclusion that the arrested person has engaged in criminal conduct, the sole rationale is his status as an arrestee. But "the due process clause of the Fourteenth Amendment prohibits as cruel and unusual the punishment of status." Wheeler v. Goodman, 306 F. Supp. 58, 62 (W.D. N.C. 1969). Accordingly, this Court has voided statutes which impose punishment because of a disease, such as narcotics addiction. Robinson v. California, 370 U.S. 660 (1962); for

the same reason, "a citizen cannot be punished merely for being a 'suspicious person'," Ricks v. District of Columbia, 414 F.2d 1097, 1110 (D.C. Cir. 1968); nor can a person be punished because of his indigent economic status. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Smith v. Florida, 405 U.S. 172 (1972). Here, there has been no determination -- indeed, there is no evidence -- that respondent's status resulted from any misconduct on his part. Thus, his status as an arrestee is a constitutionally impermissible basis for punishment.

The principle that an arrest without a trial or conviction provides no basis for the inference of guilt or the imposition of punishment is grounded in "the presumption of innocence that surrounds the defendant in a criminal prosecution." United States v. Fleischman, 339 U.S. 349 (1950). Although the presumption of innocence is not explicitly mentioned in the Constitution, this Court has indicated many times that it is assumed to be constitutionally required under the due process clauses of the Fifth and Fourteenth Amendments. See, e.g., Schware v. Board of Bar Examiners, supra; United States v. Fleischman, supra; In Re Winship 397 U.S. 358 (1970). Indeed, in Winship the Court extended the constitutional basis of the presumption of innocence to hold that the proof of guilt beyond a reasonable doubt is also constitutionally mandated. Thus, "[A] society that values the good name and freedom of every individual should not condemn

a man for commission of a crime when there is a reasonable doubt about his guilt". 397 U.S. at 364.

Here, where respondent has never been tried for the crime for which his good name has been injured and all charges against him have been dropped, there is far more than reasonable doubt about his guilt. Although our criminal justice system endows police officers with broad discretion in making arrests, it relies on the other ingredients of the system -- the preliminary hearing, the right to counsel, the presumption of innocence, and the state's burden of proving guilt beyond a reasonable doubt -- to weed out errors and to prevent the punishment of innocent persons. "It is also important to our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty." In re Winship, 397 U.S. at 358. By proclaiming to the Louisville community that Davis is an active criminal, petitioners violated the presumption of innocence, failed to meet their burden of proving guilt beyond a reasonable doubt, and thus denied him due process of law.

II

BY BRANDING RESPONDENT WITH A BADGE OF INFAMY, WITHOUT GIVING HIM NOTICE AND AN OPPORTUNITY FOR A HEARING, PETITIONERS DE-

PRIVED HIM OF HIS RIGHT TO PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

When the police publicly and officially characterized Davis as an "active shoplifter" -- without giving him notice or an opportunity for a hearing to challenge their action -- they denied him his right to procedural due process under the Fourteenth Amendment. "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction is a principle basic to our society." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951)(Frankfurter, J., concurring).

In correctly applying this principle to Davis' case, the Court of Appeals relied primarily on the decision of this Court in Wisconsin v. Constantineau, 400 U.S. 433 (1971). There, a statute permitting police officials to post in all local retail liquor stores a notice forbidding sales or gifts of liquor to persons who drink excessively was struck down for failing to provide the persons whose names were posted with advance notice and an opportunity to be heard. The Court's conclusion that "where the State attaches a 'badge of infamy' to the citizen, due process comes into play" (400 U.S. at 437) is directly on point here. In fact, the case at bar presents a stronger claim based on the denial of procedural due process

protections than did Constantineau.

The public and official characterization of Davis as an "active shoplifter" is unquestionably a "badge of infamy". While it is possible that Constantineau's posting as an excessive drinker might have been interpreted by the community as no more than a mark of illness or infirmity, no such mitigating interpretation is possible here. Being labelled a criminal is a flat proclamation of dishonesty, untrustworthiness, dangerousness to society, and immorality. Davis' good name and integrity were soiled by the police flyer without his having any opportunity to challenge petitioners' action. This is contrary to the clear requirement of Constantineau. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 400 U.S. at 437.

Petitioners' have attempted to distinguish Constantineau on the ground that the police chief in that case was acting pursuant to a statute, while the police here assertedly acted "independently of any directions or authority" [Pet. Br. at 20]. It is difficult, however, to fathom the significance of this distinction. Petitioners acknowledge that their actions were taken "under color of law" (Id. at 12), and this Court has expressly held, of course, that the absence of a statute is no bar to a suit against state officials under Section

1983. Adickes v. S.H. Kress, 398 U.S. 144 (1970).

Nor is the holding of this Court in Board of Regents v. Roth, 408 U.S. 564 (1972), that procedural due process is required only where liberty or property interests are present, any impediment to respondent's claim. The record reflects that petitioners' action in publishing the flyer directly implicated Davis' liberty interest within the meaning of Roth. Although Roth rejected the procedural due process claim of a non-tenured state university assistant professor that he was entitled to a hearing before his contract could be cancelled, the Roth Court, relying on Constantineau, stated that procedural due process would have been required had Roth been charged with "dishonesty or immorality" (408 U.S. at 573), as Davis has in this case. In Sims v. Fox, 505 F.2d 857, 863 (5th Cir. 1974) (en banc), the Fifth Circuit recently analyzed Roth in terms directly relevant to Davis' claim:

> "Roth teaches that the government's attack on one's reputation may infringe constitutionally protected liberty in two respects: (1) governmental degradation of one's standing in his community may be a denial of 'liberty'; (2) governmental communication of derogatory information to employers may be an

attack on 'liberty.'"[4]

Thus, even if petitioners were correct that the dissemination of the flyer did not directly injure respondent's employment,[5] the very "degradation of one's standing in his community" that results from being branded a shoplifter implicates the liberty interest identified in Roth and mandates the full protection afforded by constitutional procedural due process. Constantineau, Roth, and the line of cases interpreting Roth thus demonstrate that by failing to provide respondent with notice and an opportunity for a hearing before publicly labelling him a criminal, petitioners denied him the due process required by the Fourteenth Amendment.

4/ See also, Kaprelian v. Texas Women's University, 509 F.2d 133 (5th Cir. 1975); Ortwein v. Mackey, 511 F.2d 696, 698 (5th Cir. 1975)("infringement of one's liberty interest can be found . . . where the governmental agency has made . . . the allegedly stigmatizing charge public in any official or intentional manner.")

5/ Petitioners' contention that respondent was not injured, however, flies in the face of the record, which reveals that Davis' employment supervisor concluded that the circulation of the flyer had "hindered" Davis' usefulness [App. 34], since "[o]ur photographers must be accepted as reasonably honorable and trustful men wherever they go" [App. 35]. Accordingly, Davis can no longer be sent on a reporting assignment in any "merchantile establishment" [Id.].

III

PETITIONERS' WIDE DISTRIBUTION OF THE RECORD OF RESPONDENT'S ARREST NOT RESULTING IN CONVICTION, FALSELY CHARACTERIZED HIM AS A CRIMINAL, THEREBY INVADING HIS RIGHT TO PRIVACY

Although the privacy issues arising out of the use and abuse of arrest records are relatively recent developments in the law, federal and state courts throughout the country have increasingly held that the wide dissemination -- and sometimes even the retention -- of records of arrest not followed by conviction constitutes an invasion of the constitutional and common law right to privacy. See, e.g., Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974), Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970), on remand, 328 F. Supp. 718 (D.D.C. 1971), aff'd in part, rev'd in part sub nom. Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974); Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969); Kowall v. United States, 53 F.R.D. 211 (WD Mich. 1971); Wheeler v. Goodman, 306 F. Supp. 968 (WD NC 1969), United States v. Kalish, 271 F. Supp. 768 (D. PR 1967), Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971), Davidson v. Dill, 503 P.2d 157 (Colo. 1972).[6]

6/ The leading federal case on this issue

In barring dissemination and some-

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6 / continued

is Menard v. Saxbe, supra. Menard had been picked up on "suspicion" of burglary; although charges were never brought against him, his arrest record and fingerprints were forwarded to the FBI. In Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970), the Court of Appeals reversed the District Court's grant of summary judgment and held that Menard's suit to expunge his record from the FBI files on grounds of invasion of privacy stated a claim for which relief could be granted. "It is clear that the government may not, wittingly or unwittingly, engage in wanton defamation of individuals and groups" [430 F.2d at 492]. On remand, the District Court held that the dissemination of arrest records of unconvicted persons "clearly invades individual privacy by revealing episodes in a person's life of doubtful and certainly not determined import" [328 F. Supp. 718, 725 (D.D.C. 1971).] On a second appeal, the Court of Appeals affirmed the judgment barring dissemination of Menard's arrest record, and remanded the case to the District Court with instructions to order expungement of the record from the FBI's criminal files [498 F.2d 1017 (D.C. Cir. 1974)]. Although this Court has not made a definitive statement on the problem of privacy and the police records of un-

times ordering the expungement of the arrest records of persons not convicted of a crime, courts have taken judicial notice of the personal injury and economic hardship resulting from the public circulation of arrest records. As the Court of Appeals observed in Menard v. Mitchell, 430 F.2d at 490, for example, "opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved." It has also been judicially noticed that a person with an arrest record is more likely to be subject to police scrutiny -- the first to be questioned and the last to be eliminated as a suspect in an investigation. See, e.g., United States v. MacKay, 43 U.S.L.W. 233 (Feb. 11, 1975). Similarly, if a person is subsequently arrested, his prior arrest record may arise

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6 / continued

convicted persons, Mr. Justice Rehnquist has expressed the view that "as a matter of policy or philosophy this controversy seems properly resolved in Menard's favor." Rehnquist, "Is An Expanded Right of Privacy Consistent With Fair and Effective Law Enforcement?" Nelson Timothy Stephens Lectures, University of Kansas Law School, 1974, p. 12.

to haunt him in presentence reports or in seeking bail pending trial. United States v. Cifarelli, 401 F.2d 512 (2d Cir. 1968) In sum, "the seriousness of the arrest record problem, although perhaps questionable in the past, is now too well documented to be doubted." Davidson v. Dill, 503 P.2d 157, 159-60 (1972).

The wide dissemination of arrest records is a denial of both the common law and constitutionally protected right to privacy and has a restrictive effect on the exercise of other fundamental constitutional rights. As the District Court pointed out in Menard, "systematic recordation and dissemination of information about individual citizens is a form of surveillance and control which may easily inhibit freedom to speak, to work, and to move about in the land" (328 F. Supp. at 726). Here, respondent's employer has concluded that his ability to work has in fact been inhibited and he can no longer be used on certain assignments because of the publication of the police flyer. Indeed, Davis' employer has warned him that any future "incidents" resulting in the publication of a similar flyer will result in his dismissal. Accordingly, he will necessarily be influenced to steer wide of any conduct which might cost him his job, including legitimate and constitutionally protected conduct. Such overbroad penalization of innocent conduct is inherent in the circulation of the arrest

records of unconvicted persons, as the Court of Appeals pointed out in Tarlton v. Saxbe, 507 F.2d at 1124:

> "Government collection and dissemination of inaccurate criminal information without reasonable precautions to insure accuracy could induce a levelling conformity inconsistent with the diversity of ideas and manners which has traditionally characterized our national life and found legal protection in the First Amendment."

This restriction on respondent's right to work and the negative effect on his free exercixe of protected activities thus compounds the petitioners' assault on Davis' reputation. As one court has stated in an analogous circumstance, the dissemination of arrest records "constitutes an unwarranted attack upon [a person's] character and reputation, and violates his right of privacy; it violates his dignity as a human being." United States v. Kalish, 271 F. Supp. 968 (D. P.R. 1967). See also Eddy v. Moore, supra. The seriousness of the assault on privacy is exacerbated where as here respondent has never been convicted of any crime. As this Court indicated almost ninety years ago, "the essence of the offence . . . is the invasion of his indefensible right of personal security,

personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense." Boyd v. United States, 116 U.S. 616, 630 (1886) (emphasis supplied).

Petitioners even concede that their action may have invaded Davis' right of privacy, but assert that he has an exclusive civil remedy in the courts of Kentucky [Pet. Br. at 14]. But it is immaterial, insofar as the right to pursue remedies under the Civil Rights Act is concerned, that state remedies may also be available when constitutionally protected rights are infringed. This Court has repeatedly emphasized that "[i]t is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, 365 U.S. 167, 183 (1961). See also McNeese v. Board of Education, 373 U.S. 668 (1963), York v. Story, 324 F.2d 450 (9th Cir. 1963).

Although petitioners acknowledge that in certain circumstances the interest of a citizen in his personal privacy is protected by the Constitution, they urge the Court to restrict the holding of Griswold v. Connecticut, 381 U.S. 479 (1965), to a single "carefully defined 'zone of privacy'" [Pet. Br. at 13]. 7/ Given the necessary variety

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7/ It is significant that petitioners do

of facets of a right designed to protect a person's interests in reputation, mental well-being, and personal dignity -- which the right of privacy represents -- such an interpretation flies in the face of Griswold. Indeed, this Court has consistently construed the right of privacy broadly, including within its zone large areas of private behavior not subject to restrictive state action, absent a clear demonstration of compelling state interest. Here, petitioners have not offered the slightest evidence that their actions in circulating the flyer were governed by any state interest, compelling or otherwise.

The diversity of the interests protected and government actions proscribed by the right of privacy is as great as the number of constitutional provisions cited as the basis for the right. 8/ The

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7/ continued

not define this single "zone". Indeed, they recognize that in Griswold "this Court ruled that the rights secured by the First, Fourth, Fifth and Ninth Amendments have certain 'penumbras' which create 'zones of privacy'" [Pet. Br. at 13].

8/ In varying contexts and to varying degrees, the Court or individual Justices have based their recognition of the right

Constitutional protection of privacy has been found to include "the right to satisfy [one's] intellectual and emotional needs in the privacy of his own home," Stanley v. Georgia, 394 U.S. 557, 565 (1969); the right "to assume that the words [one] utters into the mouthpiece [of a telephone] will not be broadcast to the world," Katz v. United States, 389 U.S. 347, 352 (1967), and the right of parents to direct the upbringing and education of children under their control, Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). These unrelated activities are connected by the fact that their infringement inhibits the personal liberty which is the essence of the right of privacy. In

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8/ continued

of privacy on the First Amendment, Stanley v. Georgia, 394 U.S. 557 (1969); NAACP v. Alabama, 357 U.S. 449 (1958); the Fourth Amendment, Boyd v. United States, 116 U.S. 616 (1886); Katz v. United States, 389 U.S. 397 (1967); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting); the Ninth Amendment, Griswold v. Connecticut at 486 (Goldberg, J., concurring); the "penumbras" of the Bill of Rights, Griswold v. Connecticut, supra (plurality opinion); and in the concept of ordered liberty guaranteed by the Fifth and Fourteenth Amendments, Roe v. Wade, 410 U.S. 113 (1973).

protecting privacy, "time and again, this Court . . . has refused to place an unduly literal construction upon it." Olmstead v. United States, 277 U.S. 438, 476 (1928) (Brandeis, J. dissenting).

The Court, therefore, has given an expansive application to the constitutional right of privacy, including -- rather than limiting and excluding -- new and unrelated areas within its protection as the occasions arise. Indeed, Mr. Justice Brandeis, a father of both the common law and constitutional privacy doctrines, 9/ concluded that the former is always included in the latter: "Every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Olmstead v. United States, 277 U.S. at 478. Although this Court need not reach such a sweeping conclusion, it is clear that the circulation of a flyer implicating the presumptively innocent respondent as a criminal is a violation of his constitutional right of privacy no matter how the right is defined. If, as one commentator has written, the basic attribute of the right of privacy is "the individual's ability to control the

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9/ See Warren and Brandeis, Right to Privacy, 4 HARV. L. REV. 193 (1890).

flow of information concerning himself" Miller, Personal Privacy in the Computer Age, 69 MICH. L. REV. 1089, 1107 (1969), there can be no greater invasion of an innocent citizen's privacy than the public circulation of his arrest record. 10/

10/ Several courts have required the government to prove a compelling interest in order to justify invasion of a person's privacy. See, e.g., Eddy v. Moore, supra; Menard v. Mitchell, supra; Griswold v. Connecticut, supra (Goldberg, J., concurring). Petitioners, however, have shown no legitimate government interest -- compelling or not -- to justify the circulation of respondent's arrest record, and defend their action with the conclusory assertion that "retail merchants have a legitimate interest in protecting their goods from theft" [Pet. Br. at 19]. However, "[t]here is a limit beyond which the government may not tread in devising classifications that lump the innocent with the guilty." Menard v. Mitchell, 430 F.2d at 492. See also, Boorda v. Subversive Activities Control Board, 421 F.2d 1142, 1149 (D.C. Cir. 1969). Since the mere fact of arrest "has very little if any probative value in showing that [a person] has engaged in any misconduct," Schware v. Board of Examiners, 353 U.S. at 241, petitioners cannot demonstrate any compelling or legitimate state interest to justify the egregious assault which they have made on Davis' privacy.

Each of the lower court cases cited by petitioners in an attempt to show that their invasion of Davis' privacy does not amount to the deprivation of a constitutional right is distinguishable from this case. In Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966), for example, the plaintiff had already been convicted of a crime when he complained that his constitutional right of privacy had been violated by the televising of his parole hearing. Here, however, Davis has never been tried for nor convicted of any crime. Nor is Rosenberg v. Martin, 478 F.2d 520 (2nd Cir. 1973), pertinent to this case, since there the police were held not to have violated any right of privacy of a fugitive by publicizing the facts of his crime, so long as the information was reasonably related to the task of locating him and taking him into custody. Tosh v. Buddies' Supermarket, 482 F.2d 329 (5th Cir. 1973), another case upon which petitioners rely, was a suit under 42 U.S.C. Section 1983 for invasion of privacy based on the circulation of mug shots and arrest records by a private, commercial organization. It was dismissed because there was no action "under color of law" as required by the statute. The court in Tosh explicitly stated that it did not decide whether "widespread publication" of information about an individual by the police would have given rise to a cause of action cognizable under Section 1983.

Baker v. Howard, 419 F.2d 376 (9th Cir. 1969), is also distinguishable. In that case, Baker sued police officers for providing, and the manager of a radio station for broadcasting, false information that Baker had committed a crime. In rejecting plaintiff's suit for invasion of privacy, the court noted that "the case involves defendants' First Amendment right of free speech and free press and for that reason calls for the exercise of restraint" [419 F.2d at 377]. Further, the challenged action in Baker involved only the brief oral publication of misleading information about the plaintiff. However large the audience or damaging the statements may have been, they were only spoken words, evanescent as the air on which they were transmitted and soon forgotten by those who heard them. Far greater an invasion of privacy is petitioners' circulation of a written document, carrying the imprimatur of the police chief, characterizing respondent as a criminal. As Mr. Justice Harlan pointed out in another context, in dealing with oral comments "one may count on . . . the likelihood that the listener will either overlook or forget what is said," as long as he does not have "to contend with a documented record." United States v. White, 401 U.S. 748, 788 (1971) (Harlan, J., dissenting).

More relevant to this case is the decision of the Ninth Circuit Court of Appeals in York v. Story, 324 F.2d 450 (9th Cir. 1963).

There the court held that police officers may be liable under the Civil Rights Act for invasion of privacy. Although the Baker Court found that there had been no invasion of privacy in that case, it affirmed the York holding that "there can be such a gross abuse of privacy as to amount to an abridgment of fundamental constitutional guarantees." In light of the damaging and lasting effects the dissemination of arrest records has on a person's employment and reputation, the action by petitioner police chiefs in this case constitutes invasion of respondent's personal freedom and is a deprivation of his constitutionally-protected right to privacy.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

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